Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STEPHEN CHARLES FROHNE
Petitioner,

v.

THE STATE OF TEXAS
Respondent

Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1

IS A DEFENDANT IN A STATE CRIMINAL TRIAL DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS WHEN HIS COUNSEL IS UNFAMILIAR WITH SUPREME COURT PRECEDENT, THEREBY NEGATING COUNSEL'S ABILITY TO MAKE PROPER OBJECTIONS DURING THE TRIAL?

QUESTION 2

IN ORDER TO PROVIDE THE EFFECTIVE ASSISTANCE OF COUNSEL MANDATED BY THE SIXTH AND FOURTEENTH AMENDMENTS, MUST A TRIAL COUNSEL BE FAMILIAR WITH THE APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT?

QUESTION 3

IN ORDER TO PROVIDE THE EFFECTIVE ASSISTANCE OF COUNSEL MANDATED BY THE SIXTH AND FOURTEENTH AMENDMENTS, MUST A TRIAL COUNSEL BE FAMILIAR WITH LANDMARK OR SIGNIFICANT DECISIONS FROM OTHER JURISDICTIONS?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STEPHEN CHARLES FROHNE,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

To the Honorable Chief Justice of the United States, and to the Associate Justices of the United States Supreme Court:

Petitioner, Stephen Charles Frohne, files this his Petition for Writ of Certiorari to review the judgment of the Court of Criminal Appeals of Texas which refused to grant Discretionary Review of the judgment of the First Court of Appeals at Houston, Texas, affirming the convictions of Petitioner in the 56th Judicial District Court of Galveston, Texas.

OPINIONS BELOW

A copy of the order of the Texas Court of Criminal Appeals refusing Petitioner's Petition for Discretionary Review is attached hereto as Appendix A. The order of the Fourteenth Court of

Appeals, granting in part and denying in part Petitioner's Motion for Rehearing and the original Opinion of the Houston Court of Appeals are attached hereto as Appendix B. This opinion is reported at 928 S.W.2d 570. The judgment of the 56th District Court of Galveston County, Texas is attached hereto as Appendix C.

JURISDICTION

This is a criminal appeal from the highest court of a state. Petitioner's Petition for Discretionary Review was refused by the Texas Court of Criminal Appeals on February 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(1).

STATUTES INVOLVED

This appeal involves the Sixth Amendment and Fourteenth Amendment to the United States Constitution.

SUMMARY OF THE CASE

Petitioner was charged by indictment with the offense of indecency with a child. Trial was to a jury, commencing on August 10, 1994. The jury returned a verdict of guilty on August 15, 1994. On August 25, 1994, punishment was set by the court at ten years confinement in the Texas Department of Criminal Justice, probated for ten years.

At the time of trial, Petitioner's trial counsel was unfamiliar with a number of important or landmark cases, including ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993), ***Idaho v. Wright***, 497 U.S. 805, 110 S. Ct. 3139, 111 L.Ed.2d 638 (1990) and ***State v. Michaels*** 136 N.J. 299, 642 A.2d 1372 (N.J. 1994); therefore he allowed non-experts to testify as experts as to suspected abuse without lodging <u>any</u> objections to their testimony or purported expertise and he allowed the complainant to testify without objecting to her

competence to testify.[1] Trial counsel's ignorance denied Petitioner the effective assistance of counsel in his trial, requiring this Court to grant Certiorari and reverse the case. (Appendix C)

STATEMENT OF THE CASE

QUESTION 1

IS A DEFENDANT IN A STATE CRIMINAL TRIAL DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS WHEN HIS COUNSEL IS UNFAMILIAR WITH SUPREME COURT PRECEDENT, THEREBY NEGATING COUNSEL'S ABILITY TO MAKE PROPER OBJECTIONS DURING THE TRIAL?

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[1] Trial counsel's ignorance of these cases is detailed in the dissenting opinion written by Justice Michol O'Connor in the opinion of the First Court of Appeals in Houston.

Petitioner's challenge to his conviction is based upon the ineffective assistance of counsel that he received during trial. Petitioner acknowledges that he must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

John Wright, Petitioner's trial counsel, was not aware of or familiar with the cases of ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), ***Idaho v. Wright***, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), or ***State v. Michaels***, 136 N.J. 299, 642 A.2d 1372 (1994). Ignorance of landmark cases cannot be considered sound trial strategy and should be held to be ineffective assistance of counsel as a matter of law.

Knowledge of these cases was crucial to Petitioner's defense because there was no physical evidence against Petitioner. The State therefore relied upon the testimony of the alleged victim (Lisa Durfee), the testimony of the victim's godmother (Ruby Louise Hansen), a C.P.S. caseworker (George N. Schuler, Jr.), a pediatrician who examined the child (Ben Raimer, M.D.), a woman with whom the alleged victim lived for 5 months (Linda Nordstrand), the alleged victim's grandmother (Mertelle Norton) and a clinical social worker (Emily Ginsberg) to prove up its case and to secure the Petitioner's conviction.

Emily Ginsberg testified, as an expert, **without objection** by defense counsel, to the following:

(a) that the alleged victim had lived in a situation of incest for a long period of time;

(b) about the abuse that had allegedly occurred to Lisa - testimony which was not objected to;

(c) that the complainant had attempted to hurt herself and that attempts at self-mutilation are common in incest victims;

(d) that it is common for victims of incest to recant soon after disclosure;

(e) that the complainant was a sexual partner for her step-father, Petitioner herein;

(f) that the complainant exhibited symptoms that are commonly seen in incest victims;

(g) that the complainant's "resignation" was common in children who have been abused over a long period of time;

(h) about the abuse that had allegedly occurred to the complainant; and,

(i) that the approach she used with the Frohnes was that if they were saying that the complainant was a liar, why would she choose to say those things about them?

Ms. Ginsberg's testimony that abuse had occurred or that it was consistent with abuse having occurred, was merely her subjective opinion. This is especially so in light of Ms. Ginsberg's testimony at the Motion for New Trial that ***all*** of the symptoms on which Ginsberg based her conclusions about abuse occur in children who have **never** been the victims of abuse. Indeed, Ginsberg acknowledged that there is no study or treatise that she could refer to which would allow her to say that when there were the symptoms and history which she saw, there was always sexual abuse; and there is no one test that can tell you someone is sexually abused.[2]

Further, trial counsel permitted Mertelle Norton to testify - without objection or requesting a limiting instruction - that she suspected that the complainant had been sexually molested "from her behavior patterns, the gradual withdrawal, the lack of eye contact, the low self-esteem, this bubbly energetic child who had gradually

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[2] The error in not objecting to this testimony is detailed in the dissenting opinion written by Justice Michol O'Connor in the opinion of the First Court of Appeals in Houston. Appendix C.

become a loner, to me, it gave evidence that something was not right; and, you know, these are all signs of sexual abuse."[3]

In June, 1993, this Honorable Supreme Court changed the standard for the admissibility of expert testimony under Rule 702, *Fed. Rules Civ. Evid.*, in the case of ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Therein, this Honorable Court stated:

> Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. . The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds."

Id, at 113 S.Ct. 2795.

Ginsberg's and Norton's testimony was only their subjective interpretation; therefore their testimony was not admissible under ***Daubert***.[4] Trial counsel's failure to object to Ginsberg's and Norton's testimony as experts thus ignored binding United States Supreme Court precedent and breached his "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." ***Strickland v. Washington***, 466 U.S. at 688, 104 S.Ct. at 2065.

Trial counsel was also not familiar with the case of ***State v. Michaels*** 136 N.J. 299, 642 A.2d 1372 (N.J. 1994); a case which, while from another jurisdiction, has received national publicity,

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[3] The error in not objecting to this testimony is detailed in the dissenting opinion written by Justice Michol O'Connor in the opinion of the First Court of Appeals in Houston. Appendix C.

[4] Rule 702, *Tex. R. Crim. Evid.*, is derived from and contains the same language as Rule 702, *Fed. R. Evid.*, the Rule which was the subject of the ***Daubert*** decision.

being featured on such programs as *Sixty Minutes* and *20-20*.[5] In light of his failure to object, it can also be assumed that trial counsel was not familiar with the national protocols relating to the interviewing of children recited therein. As he was unfamiliar with the cases which detail how a child's memory can be corrupted, trial counsel did not challenge the competency of the complaining witness to even testify against Petitioner.

State v. Michaels, 136 N.J. 299, 642 A.2d 1372 (1994) and ***State v. Wright***, 116 Idaho 382, 775 P.2d 1224 (1989), *aff'd*, 497 U.S. 805, 110 S. Ct. 3139 (1990), establish the legal basis on which to challenge the minor complainant's competence to testify. The complainant was interviewed at least four (4) times by C.P.S., once by the pediatrician and thirty to forty times by the clinical social worker, Ginsberg. Each time that Ginsberg interviewed or counseled with the complainant, she believed the child had been abused.

State v. Michaels, 136 N.J. 299, 642 A.2d 1372 (1994) and ***State v. Wright***, 116 Idaho 382, 775 P.2d 1224 (1989), *aff'd*, 497 U.S. 805, 110 S. Ct. 3139 (1990), detail the legal and psychological authority which demonstrate that a child, who is subjected to repeated and improper interrogation, can have a false memory created, which renders the child's alleged recollection incompetent. The Courts in these cases recognized that once tainted, the distortion of the child's memory is irremediable. ***See State v. Wright***, 775 P.2d at 1228. ("Once this tainting of memory has occurred, the problem is irredeemable. That memory is, from then on, as real to the child as any other.") But trial counsel was

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[5] It is an open question, in light of today's media coverage of important cases and the ready availability of research into decisions of other jurisdictions, whether an attorney can be required to be familiar with decisions from other jurisdictions other than the one in which the case is being tried in order to provide the effective assistance of counsel mandated by the Constitution. This question should not apply with respect to the decisions of the Supreme Court of the United States, which are precedent in all jurisdictions.

unaware of these cases and made no challenge to the competence of the minor complainant to testify.

There was no sound trial strategy reason for trial counsel's failure to object to this inadmissible testimony, or to fail to at least request limiting instructions on its admission. Trial counsel's deficient performance denied Petitioner the effective assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution. ***Fitzgerald v. Estelle***, 505 F.2d 1334, 1335-37 (5th Cir. 1974) (en banc), *cert. denied*, 422 U.S. 1011, 95 S.Ct. 2636, 45 L.Ed.2d 675 (1975). It is readily apparent that there is a reasonable probability to undermine confidence in the outcome, that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Petitioner's trial counsel's performance was deficient and deprived Petitioner of the effective assistance of counsel, thereby depriving Petitioner of a fair and impartial trial, a trial with a reliable result. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984).

Petitioner does not seek an "error free" attorney, only the competent kind that is guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner's trial counsel's performance was so deficient as to raise a reasonable probability that the outcome of the trial would have been different but for the errors committed by him.

This Honorable Court required attorneys to make a *thorough* investigation of **the law** to avoid providing ineffective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). Petitioner asserts that the minimum investigation of the law that trial counsel must make is to become familiar with controlling cases of the Supreme Court of the United States; otherwise trial counsel will be unable to lodge proper objections and preserve error for appeal, or to make arguments that the state law has been changed or supplanted by the decisions of this Honorable Court. Petitioner requests this Honorable Court to draw

that "bright line" and establish this as a minimum standard for the effectiveness of counsel as relates to the investigation of the law that must be made.

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision of the Texas Court of Appeals relating to the effectiveness of Petitioner's trial counsel conflicts with the decision of this Honorable Court in ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

2. This case presents this Honorable Court with the opportunity to draw a bright line test for the effective assistance of counsel under the Sixth and Fourteenth Amendments: that in order to provide effective assistance of counsel to a criminal defendant, trial counsel's knowledge of the law must include knowledge of the applicable decisions of this Honorable Court.

3. This case presents this Honorable Court with the opportunity to address the advances in legal research as same relate to the duty of criminal defense counsel to be or become familiar with decisions from other jurisdictions, which, while not binding authority, would at least be persuasive authority and would allow defense counsel to preserve error for appeal.

CONCLUSION

For all of the reasons stated herein, this Honorable Court should grant this Petition for Certiorari. This Court should grant Petitioner general relief.

Respectfully submitted,

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APPENDIX A

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P. O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

February 19, 1997
COA#: 01-94-01226-CR
RE: Case No. 1381-96
STYLE: FROHNE, STEPHEN CHARLES

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

(JUDGE MANSFIELD WOULD GRANT)

Troy C. Bennett, Jr., Clerk

APPENDIX B

Judgment affirmed and Opinion filed April 25, 1996

In The
Court of Appeals
For The
First District of Texas

No. 01-94-01226-CR

Stephen Charles FROHNE, Appellant,
v.
The STATE of Texas, Appellee.

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 93CR1908

OPINION

A jury found appellant guilty of indecency with a child. The trial judge assessed punishment at 10-years imprisonment, probated. In four points of error, appellant complains of (1) improper bolstering of the State's witnesses, (2) insufficient evidence, (3) prosecutorial misconduct, and (4) ineffective assistance of counsel. We affirm.

Background Facts

The complainant, L.D., is a minor child who lived with her mother and her mother's husband, the appellant. L.D. stayed often with Ruby Hansen, her godmother. Hansen became suspicious that something was wrong when L.D. did not want to be alone with the appellant. In July 1993, Hansen asked L.D. whether the appellant molested her. L.D. responded affirmatively and described in

graphic detail the sexual acts in which the appellant forced her to participate. Hansen reported the problem to Child Protective Services (C.P.S.), and C.P.S. initiated an investigation. During this investigation, L.D. was interviewed four times by C.P.S. workers, once by a pediatrician, and 30 to 40 times by a clinical social worker. The investigation led to the filing of charges against the appellant.

Bolstering

In point of error one, appellant contends the State impermissibly bolstered the testimony of L.D., George Schuler, Jr., and Emily Ginsberg, two of the State's expert witnesses. Appellant waived this complaint by not objecting at trial. TEX.R.APP.P. 52(a).

We overrule point of error one.

Sufficiency of the Evidence

In point of error two, appellant contends the evidence is insufficient to prove he touched L.D.'s genitals with the intent to arouse or gratify his own sexual desires. *See* TEX.PENAL CODE s 21.01(2). We follow the usual standard of review. *Dunn v. State,* 819 S.W.2d 510, 513 (Tex.Crim.App.1991).

L.D. was 14 at the time of trial in 1994. She testified the appellant began sexual contact with her when she was about five years old and continued until she was 12, when she told Hansen. L.D. testified appellant touched her genitals with his hands, and that when he did so, it usually occurred in the bedroom. L.D. also testified the appellant made her touch his "private parts," and he would not let her close her bedroom door when she dressed. Both Ginsberg and Hansen testified L.D. told them appellant tried to penetrate L.D., performed oral sex on L.D., and forced L.D. to perform oral sex on him. The evidence is sufficient.

We overrule point of error two.

Prosecutorial Misconduct

In point of error three, appellant contends he was denied a fair trial because of prosecutorial misconduct, specifically, that the prosecutor asked him on cross-examination: (1) whether his parental rights had been terminated; and (2) whether he had served and been injured in the Vietnam War. Appellant did not object at trial, thus waiving any error.

We overrule point of error three.

Ineffective Assistance of Counsel

In point of error four, appellant raises six omissions by his attorney that he alleges were ineffective assistance of counsel during the guilt-innocence phase of trial.

We follow the usual standard of review and consider each of appellant's complaints. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex.Crim.App.1994).

No Awareness of Relevant Law

Appellant first contends counsel was ineffective because he was not familiar with two important cases, *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *State v. Michaels,* 136 N.J. 299, 642 A.2d 1372 (1994). We will address the contention when analyzing appellant's remaining allegations.

No Objection to Inadmissible Expert Testimony

Appellant asserts counsel was ineffective for not objecting to Ginsberg's expert testimony based on *Daubert* and TEX.R.CRIM.EVID. 705(c). (FN1) Ginsberg, a clinical social worker, testified as the State's expert that she had treated L.D. once a week beginning in October 1993. Appellant contends counsel was

ineffective for not objecting to the following portions of Ginsberg's testimony:

Q. Can you describe this child when she first came to you?

A. When I first saw [L.D.], she was very--what you would call emotionally flat. She did not have the after effect. She was not fearful; she did not cry. She did not seem extremely anxious as most children do. I would describe her as withdrawn. She could talk about some of the things that would happen to her, but not the kind of emotion that you would expect from a child who had been through something like that.

Q. What do you mean by that?

A. Well, she would describe to me, for example, the events that led up to child welfare intervening in her life, but she was not fearful about it. And she would not cry. She would just sit there and tell me about it with a very calm expression, really inappropriate expression for what she was describing to me.

Q. Have you seen that before in incest victims?

A. Yes.

Q. Is it common or uncommon?

A. It's common.

Q. And why do you think that is?

A. In [L.D.'s] case I think it's because she had lived in this situation for such a long period of time that she had in my opinion given up hope that anything would change, that she was resigned to the way she lived, to the things that happened to her; and it was just normal to talk about it like that.

Q. Do you find that resignation to be common?

A. Yes.

Q. Does it kind of depend upon whether the abuse is long term or short term?

A. I see it much more often in children who have been abused over a long period of time.

Q. Did you--as time went on, did you notice any changes in her?

A. Yes.

Q. Can you tell us about that?

A. Yes. Today she is quite a different child than she was when I first began to see her. She talks more about the abuse that occurred to her, the different incidents. She can talk about that with much more freedom now.

* * * *

Q. Have there been any other changes in [L.D.] that you noticed?

A. I think less depressed than initially. She has talked with me. It has taken until this spring until she trusted me to explain to me some of the times where she felt like killing herself and some attempts to hurt herself. She was very fearful that I would say she would go to a mental hospital if she told me things. She was worried about that.

Q. What are the attempts she made to hurt herself?

A. She has described to me a time when she took what she would call an overdose of Tylenol. I don't know how many pills that was. It was sometime ago; but when she took a lot of Tylenol, she said this was when she was in her mother's custody. At other times she scratched herself with her nails or

with a nail file. Again, I think I call this self mutilation, just an attempt to hurt herself. Another time she described thinking about and planning to and actually laying down behind a car that was parked in the street. The car did not move, but her intent was to have something terrible happen to her because she wasn't worth anything in her mind.

Q. These attempts at self mutilation, is that common in incest victims?

A. Yes.

* * * *

Q. Do you find it common or uncommon for children who have been the victims of incest to recant soon after they made a disclosure?

A. Yes.

Q. Why do you think that is?

A. They realize that once they have made an outcry or made a disclosure to someone who has indeed taken them seriously and report it to the police or to Children's Protective Services, they realize, I think, that they have set in motion something they can't control at all; and they become very fearful that they have wrecked their family, that they are going to be responsible for someone going--possibly being arrested, going to jail, their mother or father hating them, of being the focus of a lot more anger and disgust than they have had in the past. And the fear of the unknown is very frightening to a child.

Q. Can you describe what a parentified child is?

A. A parentified child is a child who over a course of years has had to take on several different roles within the family, many of them which are not appropriate for a child her age. And in

[L.D.'s] case she at times felt she had to take care of her mother. At times she was a sexual partner for her stepfather, at times she was supposed to be a normal child. It's at times she could be a normal child. So, there were a variety of roles; but the main ones when you call a child parentified, they have taken on roles of a parent.

Q. Did you see those symptoms in [L.D.]?

A. Yes.

Appellant first contends that Ginsberg was allowed to testify without objection to her opinion that appellant sexually abused L.D. Although Ginsberg did not directly state such an opinion, we agree it was implicit in the above-quoted testimony. Appellant further contends this opinion testimony was inadmissible under *Daubert* because it was subjective rather than factually based. Specifically, he contends the only facts Ginsberg elicited to support her opinion can also be present in children who are not sexually abused, *i.e.*, a resigned and withdrawn attitude, attempts at self-mutilation, and recanting a story. Appellant implicitly argues that the judge would not have admitted Ginsberg's opinion testimony if defense counsel had taken Ginsberg on voir dire at the beginning of her direct examination and objected to the testimony after establishing the basis of her opinion. *See* TEX.R.CRIM.EVID. 705(b).

It is within the trial court's discretion whether to allow a witness to testify as an expert. *Steve v. State,* 614 S.W.2d 137, 139 (Tex.Crim.App.1981). Appellant cites no Texas cases, and we know of none, holding counsel ineffective for failing to object to such testimony. The cases he relies on, *Cohn v. State,* 849 S.W.2d 817, 819 (Tex.Crim.App.1993), and *Duckett v. State,* 797 S.W.2d 906, 917 (Tex.Crim.App.1990), both held, unanimously in *Cohn* and by an 8-1 majority in *Duckett,* that similar testimony was admissible.

Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

TEX.R.CRIM.EVID. 702. The Court of Criminal Appeals has interpreted rule 702 similarly to FED.R.EVID. 702 in *Daubert*. *See Kelly v. State,* 824 S.W.2d 568, 571-73 (Tex.Crim.App.1992). In *Kelly,* the court addressed the admissibility of *novel* scientific evidence. *Id.* Ginsberg's testimony, however, was not based on a novel scientific test or theory, but on her consultations with L.D. and her 20 years of experience in working with sexually abused children. Based on this experience, Ginsberg testified she had noticed common behavioral patterns in children sexually abused by a family member, and L.D. displayed many of these behaviors. Thus, appellant has not shown that counsel was deficient by not objecting on the basis of rule 702.

Appellant also asserts counsel was ineffective for not objecting based on TEX.R.CRIM.EVID. 705(c) because Ginsberg's testimony did not have a sufficient basis. There is language in *Cohn* suggesting that testimony like Ginsberg's "may well have been objectionable" under rule 705(c). 849 S.W.2d at 819. In discussing the relevancy of expert testimony describing the behavior of sexually abused children, the court stated:

> The probative value of expert testimony describing behaviors observed in young sexually abused children is highest when there is a coalescence of three types of behaviors: (1) a central core of sexual behaviors which are strongly associated with sexual abuse; (2) nonsexual behaviors which are commonly observed in sexually abused children; and (3) medical evidence of sexual abuse.

Probative value declines as sexual behaviors and medical evidence decrease in proportion to nonsexual behaviors. When the only evidence consists of a number of ambiguous, nonsexual behaviors, the evidence may lack any probative value, or probative worth may be outweighed by the potential for unfair prejudice or jury confusion.

When a child demonstrates no sexual behaviors, but does experience signs of serious anxiety or post-traumatic stress disorder, expert testimony may still be relevant. In this scenario, however, testimony serves only to establish that the child may have experienced some type of traumatic event. Such testimony is not specific to sexual abuse.

Absent medical evidence or evidence of behavior more closely determinative of sexual abuse, it seems the psychological community is unwilling to find evidence of anxiety sufficient to support the conclusion, even to a reasonable clinical certainty, that *sexual* abuse has necessarily occurred. Therefore, to the extent Roy's testimony may have suggested that evidence of anxiety behavior is enough in and of itself to indicate *sexual* abuse, it may well have been objectionable under TEX.R.CRIM.EVID., Rule 705(c). But to the extent it only provided circumstantial evidence that the children did experience some traumatic event, Dr. Roy's testimony, both that anxiety behavior is at least consistent with sexual abuse, and that the children here exhibited such behavior in his presence, was relevant evidence, under TEX.R.CRIM.EVID., Rules 401 & 402. It should come in as substantive evidence unless "its probative value is substantially outweighed by the danger of unfair prejudice ..." TEX.R.CRIM.EVID., Rule 403.

* * * *

Dr. Roy's testimony that the children exhibited anxiety behaviors is circumstantial evidence that *something* traumatic happened to them. That this evidence in some small measure corroborates the children's own testimony that appellant sexually molested them does not make

it any less relevant--in fact, quite the opposite. Of course, like all corroborating evidence, because it is consistent with the children's story, it also has a tendency to make their testimony more plausible. But we should not for that reason exclude it for "unfair prejudice" under Rule 403, supra.

Cohn, 849 S.W.2d at 818-20 (footnotes and interior quotes omitted) (emphasis in original).

Even if Ginsberg's testimony was objectionable under rule 705(c), to the extent it suggested that "anxiety behavior is enough in and of itself to indicate sexual abuse," 849 S.W.2d at 819, and even if defense counsel had objected on this basis, the prosecutor still could have used Ginsberg's testimony to prove that anxiety behavior was "consistent" with sexual abuse and that L.D. exhibited such behavior in Ginsberg's presence. *See id.* at 819; TEX.R.CRIM.EVID. 401-02. The *Cohn* case does not make testimony like Ginsberg's inadmissible per se, and the difference between testimony that "may" be inadmissible under *Cohn* and that which *Cohn* expressly allows is not so great that there is a reasonable probability the outcome of the trial would have been different if counsel had objected.

No Challenge to Competency of Witness

Appellant contends counsel was ineffective for not challenging L.D.'s competency to testify. L.D. was interviewed numerous times before trial by C.P.S. workers, by a pediatrician, and by Ginsberg. Based on *Michaels,* a New Jersey case, appellant contends defense counsel could have established L.D.'s sexual memories were implanted and challenged her competency to testify.

We decline to hold defense counsel ineffective for not relying on nonbinding authority from another jurisdiction. Further, an objection to L.D.'s competency would likely have been overruled. A witness with personal knowledge may testify. TEX.R.CRIM.EVID. 602. L.D. had personal knowledge. Thus,

appellant's contention that L.D. could have been shown to be an incompetent witness is, at best, highly speculative.

Finally, L.D.'s initial outcry statement, which of course was made before any interviews, was more damaging to appellant than L.D.'s trial testimony. In her outcry statement, L.D. said appellant tried to put his penis in her several times, kissed her "all over" and made her kiss him "all over," told her it was okay if she "swallowed it," and touched her "private parts" with his tongue and hand. Under these circumstances, we conclude that counsel's decision not to pursue this strategy was not deficient, and in addition, there is no reasonable probability that pursuing it would have led to a different result at trial.

No Objection to Improper Interrogation

Appellant next contends defense counsel was ineffective for not objecting to improper pretrial interrogation of L.D. Appellant asserts counsel should have introduced into evidence three videotaped pretrial interviews with L.D. to show she was improperly coached during the interviews. The videotapes are not part of the record. Therefore, no deficiency has been shown.

Appellant next argues counsel should have objected that C.P.S. interviewed L.D. without recording some of the interviews. There is no recording requirement. Therefore, counsel was not deficient.

No Request for Limiting Instructions

Appellant next contends counsel was ineffective for not requesting limiting instructions as to the testimony of witnesses who were not outcry witnesses. *See* TEX.CODE CRIM.PROC. art. 38.07. (FN2) Appellant relies on *Brown v. State,* 649 S.W.2d 160 (Tex.App.--Austin 1983, no pet.), in which the court held an expert who is not an outcry witness under article 38.07 may still testify about an outcry statement in order to show the basis for his expert opinion. *Id.* at 163 (doctor who testified as medical expert could relate statement by victim). The court did not hold that limiting

instructions were required, nor did the defendant there contend they were. The contention on appeal was that the doctor's testimony was inadmissible hearsay. *Id.* at 161. The court observed that no limiting instruction was requested; thus, any potential error was waived. *Id.* at 163. Moreover, appellant does not state what limiting instruction should have been given. Thus, no deficiency has been shown.

No Objection to Mertelle Norton's Testimony

Mertelle Norton, L.D.'s grandmother, testified as an expert witness for the State. Appellant contends counsel was ineffective for not objecting to Norton's testimony because (1) Norton was not qualified as an expert witness, and (2) Norton's testimony that L.D. was sexually abused was based on symptoms that are consistent with traumatic experiences other than sexual abuse. Norton's testimony regarding the symptoms of sexual abuse was cumulative of Ginsberg's testimony. Therefore, appellant cannot show the lack of objection constituted ineffective assistance. Moreover, Norton's suspicions of abuse were based on her education, training, and experience as a pediatric nurse. Because the qualifications of experts is a discretionary matter for the trial judge to decide, appellant has not shown that an objection on this basis to Norton's testimony would have been sustained.

Finally, we observe that trial counsel convinced the judge to grant appellant probation, even though the State argued for the maximum sentence of 20 years. Although appellant, for this obvious reason, does not attack counsel's performance at the punishment stage, this fact also influences our conclusion that counsel was not ineffective.

We overrule point of error four.

We affirm the judgment.

/s/ Murry B. Cohen
Murry B. Coyhen
Justice

Justices O'Connor and Wilson also sitting.

Justice O'Connor dissents.

Publish. TEX. R. APP. P. 90

Judgment rendered and opinion delivered April 25, 1996
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

In The
Court of Appeals
For The
First District of Texas

No. 01-94-01226-CR

Stephen Charles FROHNE, Appellant,
v.
The STATE of Texas, Appellee.

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 93CR1908

DISSENTING OPINION

I dissent on the resolution of point of error four. I would hold the appellant, Stephen Charles Frohne, was denied reasonably effective assistance of counsel. I would reverse and remand for a new trial.

Failure to Object to Corruption of Memory

In point of error four, the appellant contends his trial counsel was ineffective for not challenging the competency of the minor, L.D., to testify. Specifically, the appellant contends L.D. was repeatedly interviewed by persons who were hostile to the appellant and believed him to be guilty. The appellant contends that when a child is subjected to repeated and improper interrogation, it can result in the creation of a false memory that renders the child's recollection incompetent. The appellant contends defense counsel should have attempted to establish L.D.'s memories were implanted and should have challenged L.D.'s competency to testify.

The majority overrules this complaint stating L.D.'s outcry statement was made before she was interviewed by the CPS's employees, and her outcry statement was more damaging than her trial testimony. That response overlooks the fact that L.D. was repeatedly interviewed before the outcry statement by her grandmother and godmother. Both women believed the appellant was sexually abusing L.D.

The National Center for the Prosecution of Child Abuse, in cooperation with the National District Attorney's Association and the American Prosecutor's Research Institute, has adopted protocols to serve as standards for the proper interrogation of suspected child-abuse victims. Those interview guidelines require that an interviewer remain "open, neutral and objective." *State v. Michaels,* 136 N.J. 299, 642 A.2d 1372, 1378 (1994). Under those guidelines, an interviewer should not use leading questions, force a reluctant child to talk, speak negatively about the person accused, and should avoid multiple interviews with various interviewers. *Id.* (FN1)

In spite of these well-developed guidelines for conducting interviews of a child-victim in a sexual abuse case, the appellant's lawyer did not make any of the appropriate objections or develop the record to show that L.D.'s memory might have been corrupted by the influence of repeated interviews with persons who were hostile to the appellant.

If a competent lawyer had represented the appellant, he or she would have challenged the testimony of L.D. on the ground that L.D.'s memory had been corrupted by interviews conducted by persons who were hostile to the appellant and who showed their hostility to L.D. There is no sound trial strategy that can explain why trial counsel did not attempt to show the repeated interviews improperly influenced the memory of L.D., making her incompetent to testify.

I would hold the failure of trial counsel to pursue the line of inquiry suggested by reading the *Michaels* case resulted in ineffective assistance of counsel.

Failure to Object to Inadmissible Expert Testimony

As part of point of error four, the appellant asserts his trial counsel was ineffective because he did not object to expert testimony from Emily Ginsberg and Mertelle Norton. Ginsberg, a clinical social worker, and Norton, L.D.'s grandmother and a nurse, testified the symptoms displayed by L.D. were common to children who had experienced sexual abuse. Based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the appellant contends his defense counsel should have challenged the scientific basis of this testimony. The appellant contends neither witnesses' testimony rises to the level of admissible expert testimony under Tex.R.Crim.Evid. 702. I agree.

The appellant argues Ginsberg's subjective belief does not qualify as "scientific, technical or other specialized knowledge that will assist the trier of fact." The appellant objects that Ginsberg testified to the following matters without objection from his lawyer:

* That L.D. had lived in a situation of incest for a long period of time;

* That L.D. had attempted to hurt herself, which was common of incest victims;

* That it was common for incest victims to recant soon after disclosure;

* That L.D. was a "sexual partner" with her step-father and replaced her mother;

* That L.D. exhibited symptoms commonly seen in incest victims; and

* That L.D.'s "resignation" was common in children who have been sexually abused for a long time.

The appellant objects that Norton testified to the following matters without objection from his lawyer:

* That she suspected L.D. had been abused by her "behavior patterns," which included gradual withdrawal, lack of eye contact, and low self-esteem.

The testimony of Ginsberg and Norton was their subjective interpretation of symptoms. Their testimony did not rise to the level of expert testimony admissible under Tex.R.Crim.Evid. 702. The Texas Rules of Criminal Evidence are based on the Federal Rules of Evidence. In June 1993, before this case was tried, the United States Supreme Court changed the standard for the admissibility of expert testimony under the Federal Rules in *Daubert*. The Court said:

> [T]he word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds."
>
> 509 U.S. at 590, 113 S.Ct. at 2795 (citation omitted).

The appellant contends the opinion testimony in this case was inadmissible under *Daubert* because it was subjective rather than factually based. Specifically, the appellant contends the only facts Ginsberg elicited to support her opinion can also be present in children who are not sexually abused, *i.e.*, a resigned and withdrawn attitude, attempts at self-mutilation, and recanting a story. (FN2)

The majority responds to this argument by stating the well-known standard of review--it is within the trial court's discretion whether to allow a witness to testify as an expert. The majority notes the Court of Criminal Appeals moved in the same direction of interpreting Tex.R.Crim.Evid. 702 as the United States

Supreme Court has interpreted Fed.R.Evid. 702 in *Daubert*. *See Kelly v. State,* 824 S.W.2d 568, 571-73 (Tex.Crim.App.1992).

In *Kelly,* the Court of Criminal Appeals addressed the admissibility of *novel* scientific evidence. *Id.* The majority holds Ginsberg's testimony in this case was not based on a novel scientific test or theory, but was based on Ginsberg's consultations with L.D. and her 20 years of experience in working with sexually abused children. That misses the point. Even though she had years of experience, her experience is merely anecdotal, and is not supported with any scientific indicia of reliability. The "expert" testimony offered by Ginsberg and Norton would not survive a challenge made by a lawyer familiar with *Daubert*. Unfortunately for the appellant, his lawyer was not familiar with *Daubert*.

The majority admits that, based on *Cohn v. State,* 849 S.W.2d 817, 818-19 (Tex.Crim.App.1993), Ginsberg's testimony was objectionable when it suggested evidence of anxiety behavior is sufficient to indicate sexual abuse. The majority states that the same testimony could have been admitted to show the behavior was consistent with sexual abuse. I disagree. Under *Daubert,* I do not think the testimony would have been admissible even to show the evidence was consistent with sexual abuse. If the appellant's attorney had objected and the court had excluded the testimony of Ginsberg and Norton regarding the connection between L.D.'s symptoms and sexual abuse, it would have reduced the chances of the appellant's conviction.

I believe the appellant has shown a reasonable probability the outcome of the trial would have been different had counsel objected.

/s/ Michol O'Connor
MICHOL O'CONNOR
Justice

Justices Cohen and Wilson also sitting.

Publish. TEX. R. APP. P. 90

Judgment rendered and opinion delivered
True Copy Attest:

/s/ Margie Thompson
Clerk of Court

Order entered August 15, 1996

In The
Court of Appeals
For The
First District of Texas

No. 01-94-01226-CR

Stephen Charles FROHNE, Appellant,
v.
The STATE of Texas, Appellee.

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 93CR1908

ORDER ON MOTION FOR REHEARING

Appellant filed a motion to supplement the record on appeal and a motion for rehearing. With Justice Cohen dissenting, the panel grants the motion to supplement the record on appeal. With Justice O'Connor dissenting, the panel overrules the motion for rehearing. However, we proceed to address an issue raised by the new material that has been added to the record.

On original submission, appellant contended counsel was ineffective because he did not introduce into evidence at trial three videotaped pretrial interviews with L.D. to show she was improperly coached during the interviews. This court held no deficiency was shown because the videotapes were not part of the record. We now grant appellant's motion to supplement the record with the tapes and consider whether counsel was ineffective for not introducing them into evidence at trial.

This Court has reviewed the tapes. The tapes were made by CPS in July 1993 shortly after CPS initiated the investigation against appellant. All three tapes contain interviews between Schuler and L.D. Schuler was the CPS investigator assigned to the investigation of whether appellant molested L.D.

The first tape, recorded July 6, 1993, contains video but no audio. The video camera was not operating properly when this tape was made. Although we cannot tell what was said on this tape, the record shows that L.D. denied on the tape that appellant had molested her. The second tape, recorded July 16, 1993, contains audio, but the video is distorted. The third tape, recorded July 19, 1993, contains both audio and video.

The interviews on the second and third tapes were conducted similarly. Schuler interviewed L.D. in an informal manner. At times, he asked L.D. open-ended questions, but other times he prefaced his questions by explaining to L.D. what he knew about the case from his investigation. Viewed as a whole, we do not find the second and third tapes strongly suggestive. L.D. answered Schuler's questions calmly and confidently, and a jury would likely find her to be a credible witness. L.D. explained on the second and third tapes that she lied on the first tape because she was scared CPS would take her away from her mother if she told the truth. When she learned that this would not happen, L.D. decided to tell the truth.

Schuler testified for the State at appellant's trial. On cross-examination, counsel for appellant got Schuler to admit that L.D. denied being molested by appellant during the first taped interview.

L.D. also testified for the State at appellant's trial. On both direct and cross-examination, L.D. testified that she denied during the first taped interview with Schuler that appellant had molested her. L.D. said she did this because she was scared and did not know what would happen. On cross-examination, counsel for

appellant got L.D. to admit that she had changed her story several times, *i.e.:*

1. On July 5, 1993, when talking with Schuler at her house, L.D. said appellant had molested her;

2. On July 6, 1993, during the first taped interview, L.D. denied appellant had molested her; and

3. On July 16 and 19, 1993, during the second and third taped interviews, L.D. again said appellant had molested her.

After viewing the tapes, we conclude appellant has not overcome the strong presumption that trial counsel's decision to not introduce the tapes into evidence might be considered sound trial strategy. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex.Crim.App.1994). The questions in Schuler's interviews were not strongly suggestive, and L.D. appeared to be a credible witness. Although L.D. denied appellant molested her during the first taped interview, counsel could not establish this by playing the tape because there was no sound. Counsel adequately established this fact through cross-examination of Schuler and L.D. Had counsel introduced the tapes into evidence as appellant suggests, we are not convinced there is a reasonable probability the outcome of appellant's trial would have been different. *Jackson,* 877 S.W.2d at 771.

We overrule appellant's motion for rehearing.

/s/ Davie L. Wilson
Davie L. Wilson
Justice

Justices Cohen and O'Connor also participating.

Justice O'Connor dissents.

Publish. TEX. R. APP. P. 90

Judgment rendered and opinion delivered August 15, 1996
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

In The
Court of Appeals
For The
First District of Texas

No. 01-94-01226-CR

Stephen Charles FROHNE, Appellant,
v.
The STATE of Texas, Appellee.

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 93CR1908

DISSENTING OPINION

I withdraw my original dissenting opinion and issue this one in its place.

I dissent on the resolution of point of error four. I would hold the appellant, Stephen Charles Frohne, was denied reasonably effective assistance of counsel. I would reverse and remand for a new trial.

Failure to Object to Corruption of Memory

In point of error four, the appellant contends his trial counsel was ineffective for not challenging the competency of the minor, L.D., to testify. Specifically, the appellant contends L.D. was repeatedly interviewed by persons who were hostile to the appellant and believed him to be guilty. The appellant contends that when a child is subjected to repeated and improper interrogation, it can result in the creation of a false memory that renders the child's recollection incompetent. The appellant contends defense counsel

should have attempted to establish L.D.'s memories were implanted and should have challenged L.D.'s competency to testify.

The majority overrules this complaint stating L.D.'s outcry statement was made before she was interviewed by the CPS's employees, and her outcry statement was more damaging than her trial testimony. That response overlooks the fact that L.D. was repeatedly interviewed before the outcry statement by her grandmother and godmother. Both women believed the appellant was sexually abusing L.D.

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[1] In a civil case involving recovered memory of sexual abuse, the Supreme Court said:

> Memory is a multifarious, complex, usually reconstructive process. It does not retrieve information the way a video recorder or computer does. Everything sensed is not stored; recall of picture-perfect images is not automatic. A variety of social, psychological, and developmental factors commonly cause distortions at each stage of the process.... The real possibility of such distortions cannot be overlooked or minimized in determining what relation recalled memories bear to what really happened.

S.V. v. R.V., 39 Tex.Sup.Ct.J. 386, 398-99 (March 14, 1996).

In spite of these well-developed guidelines for conducting interviews of a child-victim in a sexual abuse case, the appellant's lawyer did not make any of the appropriate objections or develop the record to show that L.D.'s memory might have been corrupted by the influence of repeated interviews with persons who were hostile to the appellant.

If a competent lawyer had represented the appellant, he or she would have challenged the testimony of L.D. on the ground that L.D.'s memory had been corrupted by interviews conducted by persons who were hostile to the appellant and who showed their hostility to L.D. There is no sound trial strategy that can explain why trial counsel did not attempt to show the repeated interviews improperly influenced the memory of L.D., making her incompetent to testify.

I would hold the failure of trial counsel to pursue the line of inquiry suggested by reading the *Michaels* case resulted in ineffective assistance of counsel.

Failure to Object to Inadmissible Expert Testimony

As part of point of error four, the appellant asserts his trial counsel was ineffective because he did not object to expert testimony from Emily Ginsberg and Mertelle Norton. Ginsberg, a clinical social worker, and Norton, L.D.'s grandmother and a nurse, testified the symptoms displayed by L.D. were common to children who had experienced sexual abuse. Based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the appellant contends his defense counsel should have challenged the scientific basis of this testimony. The appellant contends neither witnesses' testimony rises to the level of admissible expert testimony under Tex.R.Crim.Evid. 702. I agree.

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* That L.D. had lived in a situation of incest for a long period of time;

* That L.D. had attempted to hurt herself, which was common of incest victims;

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The testimony of Ginsberg and Norton was their subjective interpretation of symptoms. Their testimony did not rise to the level of expert testimony admissible under Tex.R.Crim.Evid. 702. The Texas Rules of Criminal Evidence are based on the Federal Rules of Evidence. In June 1993, before this case was tried, the United States Supreme Court changed the standard for the admissibility of expert testimony under the Federal Rules in *Daubert*. The Court said:

[T]he word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds."

509 U.S. at 590, 113 S.Ct. at 2795 (citation omitted).

The appellant contends the opinion testimony in this case was inadmissible under *Daubert* because it was subjective rather than factually based. Specifically, the appellant contends the only facts Ginsberg elicited to support her opinion can also be present in children who are not sexually abused, *i.e.*, a resigned and withdrawn attitude, attempts at self-mutilation, and recanting a story.[2]

The majority responds to this argument by stating the well-known standard of review--it is within the trial court's discretion whether to allow a witness to testify as an expert. The majority notes the Court of Criminal Appeals moved in the same direction of interpreting Tex.R.Crim.Evid. 702 as the United States Supreme Court has interpreted Fed.R.Evid. 702 in *Daubert*. *See Jordan v. State*, 928 S.W.2d 550, 553-55 (Tex.Crim.App.1996); *Kelly v. State*, 824 S.W.2d 568, 571-73 (Tex.Crim.App.1992).

In *Jordan* and *Kelly*, the Court of Criminal Appeals addressed the admissibility of scientific evidence. *Jordan*, at 572-574; *Kelly*, 824 S.W.2d at 571-73. The majority holds Ginsberg's testimony in this case was not based on a novel scientific test or theory, but was based on Ginsberg's consultations with L.D. and her 20 years of experience in working with sexually abused children. That misses the point. Even though she had years of experience, her experience is merely anecdotal, and is not supported with any scientific indicia of reliability. The "expert" testimony offered by Ginsberg and Norton would not survive a challenge made by a lawyer familiar with *Daubert*. Unfortunately for the appellant, his lawyer was not familiar with *Daubert*.

---

[2] In *S.V. v. R.V.*, the Supreme Court was presented with a case involving symptoms some experts said showed evidence of sexual abuse but which could also be evidence of other problems. In that case, the Court said it would not lower the bar of limitations based on a swearing match between experts over opinions. 39 Tex.Sup.Ct.J. at 397. If such expert testimony does not meet a minimal level to even support a civil suit, it should not contribute to a defendant's conviction.

The majority admits that, based on *Cohn v. State,* 849 S.W.2d 817, 818-19 (Tex.Crim.App.1993), Ginsberg's testimony was objectionable when it suggested evidence of anxiety behavior is sufficient to indicate sexual abuse. The majority states that the same testimony could have been admitted to show the behavior was consistent with sexual abuse. I disagree. Under *Daubert,* I do not think the testimony would have been admissible even to show the evidence was consistent with sexual abuse. If the appellant's attorney had objected and the court had excluded the testimony of Ginsberg and Norton regarding the connection between L.D.'s symptoms and sexual abuse, it would have reduced the chances of the appellant's conviction.

I believe the appellant has shown a reasonable probability the outcome of the trial would have been different had counsel objected.

/s/ Michol O'Connor
MICHOL O'CONNOR
Justice

Justices Cohen and Wilson also sitting.

Publish. TEX. R. APP. P. 90

Judgment rendered and opinion delivered August 15, 1996
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

APPENDIX C

/s/illegible

P/NG - JURY/COURT PUNISH/COMMUNITY SUPERVISION
[JUDG13] [REV. 09/93]

NO. 93CR1908

Date stamp: illegible

THE STATE OF TEXAS IN THE DISTRICT COURT OF

VS. GALVESTON COUNTY, TEXAS

STEPHEN CHARLES FROHNE 56TH JUDICIAL DISTRICT

JUDGMENT

On the 10th day of August, 1994, the above numbered and entitled cause was regularly reached and called for trial, when came the State of Texas by her Criminal District Attorney, Susan Criss, and the Defendant, STEPHEN CHARLES FROHNE, appeared in person and by his Attorney, John Wright, and both parties announced ready for trial, and the Defendant was duly arraigned in open Court and pleaded not guilty to the charge contained in the indictment; thereupon a jury, to-wit: Leslie Poole and eleven other, was duly selected, impaneled, and sworn, who having heard the evidence submitted and having been duly charged by the Court, and having heard the arguments of counsel, retired in charge of the proper officer to consider their verdict, and afterwards being brought into open Court by the proper officer, and the Defendant and his counsel being present, and in due form of law returned into open Court the following verdict on the 15th day of August, 1994, which was received by the Court, and is here and now entered upon the minutes of the Court, to-wit:

> "We, the Jury, find the Defendant, STEPHEN CHARLES FROHNE, guilty of the offense of Indecency with a Child as alleged in the indictment.

/s/ LESLIE POOLE
FOREMAN OF THE JURY"

The Defendant named above not having requested in writing at the time he entered his plea that the jury assess the punishment, the jury was discharged.

On the 25th day of August, 1994, the Defendant appeared in person and with his attorney, John Wright, and the State appeared by her Criminal District Attorney and in accordance with the law the Court heard further evidence on the issue of punishment and after arguments of counsel, assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of ten (10) years (and in addition thereto pay a fine in the amount of $ 0).

And it further appearing to the Court that the Defendant, has not previously been convicted of a felony, and that the ends of justice and the best interest of the public as well as the Defendant will be served thereby, the imposition of sentence is suspended, and the said Defendant herein is hereby placed on Community Supervision for a period of (10) years, in accordance with the Adult Community Supervision and Parole Law of the State of Texas, conditioned that during the term of the Community Supervision, the Defendant shall (all references to G.C.C.S.C.D. means the Galveston County Community Supervision and Corrections Department):

1. Commit no offense against the laws of the State of Texas or of any other State, the United States or any governmental entity;
2. Avoid injurious or vicious habits;
3. Avoid persons or places of disreputable or harmful character; and specifically avoid association with any person previously convicted of a crime, or presence at any location where a criminal act is being committed;

4. Report in person to the Supervision Officer, at least once each month as directed by the Supervision Officer and obey all rules and regulations of the G.C.C.S.C.D.;
5. Permit the Supervision Officer to visit at his home or elsewhere without restriction;
6. If you are currently working, continue to work at such employment as long as possible and if unemployed, serious attempts must be made to find employment and proof of such attempts must be shown to your Supervision Officer at each reporting session;
7. Remain in the following location: Galveston County, Texas unless obtaining permission to leave from this Court;
8. Support all dependents he may have or acquire during the term of Community Supervision;
9. Report within forty-eight hours to the Supervision Officer any change of address, employment, or marital status; any arrests and all sources and amounts of income or money received;
10. Abstain from the use or possession of any drugs, except those taken or possessed under doctors orders;
11. Never become intoxicated;
12. Pay to the G.C.C.S.C.D. $40.00 per month as a Community Supervision fee;
13. Pay to the G.C.C.S.C.D. $209.50 in Court Costs. Such costs shall be paid (by_____) (in installments of $10.00 per month paid each month);
14. Pay to the G.C.C.S.C.D. a fine of $ 0. Such fine shall be paid (by _____) (in installments of $_____ per month paid each month);
15. ( ) Pay to the G.C.C.S.C.D. $ 0 as restitution to the victim. Such restitution shall be paid (by _____) (in installments of $_____ per month paid each month);
16 ( ) Pay to the G.C.C.S.C.D. $____ to reimburse the County for attorney fees for Court appointed attorney. Such fees shall be paid (by _____) (in installments of $_____ per month paid each month);

16A. (X) Pay to the G.C.C.S.C.D. $25.00 as a Crime Stoppers Program payment. Such payment shall be paid (by 10/25/94) (in installments of $_____ per month paid each month)

16B. ( ) Pay to G.C.C.S.C.D. $_____ as repayment of a _____ Crime Stoppers Program award that was distributed in this case. Such payment shall be paid (by _____) (in installments of $____ per month paid each month). Payment should be forwarded to the above program at: _____.

16C. ( ) Pay to the G.C.C.S.C.D. $____ to reimburse the County for extradition costs. Such costs shall be paid (by _____) (in installments of $_____ per month paid each month);

17. (X) Pay to the G.C.C.S.C.D. $5.00 per month as a fee to the Sexual Assault Program Fund pursuant to Article 42.12, Section 19 (e) of the Texas Code of Criminal Procedure;

18. ( ) Participate in a drug screening program designed to detect controlled substances as directed by the G.C.C.S.C.D., Defendant agrees to refrain from breaking any Texas drug law and realizes that failure to get a clean report from such drug screening may alone be sufficient to revoke his community supervision;

19A. ( ) Participate in the Intensive Supervision Program administered through the G.C.C.S.C.D. and report to the Supervision Officer at least once per week or as directed by his Adult Supervision Officer, for a period of one year;

19B. ( ) Participate in the Specialized Substance Abuse Supervision Program administered through the G.C.C.S.C.D. and report to the Supervision Officer at least once a week or as directed by the Supervision Officer for a period of one year;
The Defendant shall participate in a substance abuse evaluation and furnish proof to the Supervision Officer of such appointment and a written report with the findings and recommended treatment shall be furnished to the Supervision Officer. The Defendant will maintain the outpatient treatment suggested until finally released by the treatment agency or Court and proof of release furnished to the Supervision Officer in writing;

20. ( ) Not operate a motor vehicle unless the vehicle is equipped with a devise that uses a deep lung breath analysis

mechanism to make impractical the operation of the motor vehicle if ethyl alcohol is detected in the breath of the operator;

21. ( ) Abstain from the use of alcohol in any form at any time and do not enter any bar, tavern, lounge or other similar place;

22. ( ) Observe a curfew and be home each night before ____ a.m./p.m. unless a later time is approved in advance by the Community Supervision Office and the Court;

23. ( ) Not operate a motor vehicle on a public road;

24. ( ) Serve _____ days in the Galveston County Jail; credit allowed for ____ served;

25. ( ) Serve ____ consecutive weekends in the Galveston County Jail, beginning Friday _____; Report before 7:00 p.m.; Release at 12:01 a.m. each following Monday;

26. (X) Participate for a period of 240 hours in the following community-based program/community work program, to-wit: as directed by the Court;

27A. ( ) Demonstrate to the G.C.C.S.C.D. that Defendant has attained an education skill level that is equal to or greater that the average skill level of students who have completed the sixth grade in public schools in this State;

27B. ( ) Attain the educational skill level set forth in 27A above;

28. ( ) Attend and successfully complete a program designed to educate persons on the dangers of drug abuse pursuant to Article 6687b, Section 24B of the Revised Civil Statutes;

29. ( ) Attend counseling sessions for substance abusers; participate in substance abuse treatment services in a program or facility approved or licensed by the Texas Commission on Alcohol and Drug Abuse. The Defendant shall remain in therapy until released by the substance abuse treatment program and proof of release shall be furnished to his Supervision Officer in writing;

30. ( ) Attend weekly meetings of Alcoholics Anonymous and furnish proof of attendance to the Supervision Officer. The Defendant shall attend A.A. meetings until released by the Supervision Officer;

31. (X) The Defendant is ordered not to directly communicate with LISA DURFEE or go near a residence, school or other location, to-wit _____;
( ) The Defendant may have supervised access to _____ as follows, to-wit:_____;

32. (X) Attend psychological counseling sessions at the direction of the Supervision Officer;
( ) Pay _____ % of the reasonable and necessary costs incurred by _____ for psychological counseling made necessary by the offense for a period not to exceed one year. The Court finds the Defendant is financially able to make said payments;

33. (X) Within thirty (30) days make an appointment for a SEXUAL OFFENDERS assessment evaluation and furnish proof to the Supervision Officer of such appointment and then a written report with the findings and recommended therapy shall also be furnished to the Supervision Officer. The Defendant will maintain the treatment suggested until finally released and proof of release once again furnished in writing;

34. ( ) Within thirty (30) days from today's date the Defendant is ordered to enroll in the Batterers Clinic at the Family Service Center of Galveston County. The Defendant shall be required to attend a meeting once a week for a period of twelve (12) weeks. Upon completion of this program, the Defendant must provide written documentation of completion to his Supervision Officer. The Defendant will be financially responsible for these services;

35. (X) Defendant is ordered to report to the League City Police Department within seven (7) days of this date and register pursuant to Article 6252.13 (c)(1), V.T.C.S., the Sex Offender Registration Program;

36. (X) Defendant is not to participate in employment or volunteer work that requires supervising, taking care of, or teaching children;

The Court may alter or revoke Community Supervision for violation of any condition of Community Supervision. No condition

may be altered without written order by this Court except that the Supervision Officer supervising this Defendant is authorized, with the written consent of the Defendant, to transfer this Defendant to different programs within the Community Supervision Program in accordance with Article 42.12, Section 10(d)(e), C.C.P. To qualify for Community Supervision, the Defendant waives extradition from another state or foreign nation if a motion to revoke community supervision is filed against him in this cause.

And, the Defendant in open court, in person, informed the Court that he did not wish to appeal his conviction and waived the right to file a motion for new trial or to appeal the conviction.

And the foregoing terms and conditions of Community Supervision having been made known to the Defendant, in person, in open Court, the Defendant voluntarily and agreed to the same and bound himself to comply with them.

And the Defendant's thumbprint that appears on this judgment was taken in accordance with Article 38.33 of the Code of Criminal Procedure.

Whereupon, it was the further order of the Court that the Defendant be now released from custody upon Community Supervision as herein provided for.

SIGNED on this the 25th day of August, A.D., 1994.

/s/ illegible
JUDGE PRESIDING
56TH JUDICIAL DISTRICT COURT
GALVESTON COUNTY, TEXAS

I acknowledge receipt of a copy of the above Order of Community Supervision and fully understand same.

/s/ STEPHEN C. FROHNE
DEFENDANT

A copy furnished to the above named Defendant and noted in the Docket on this the 25th day of August, 1994.

EVELYN WELLS ROBISON, DISTRICT CLERK
GALVESTON COUNTY, TEXAS

BY:/s/illegible ____, DEPUTY
CLERK 56TH JUDICIAL DISTRICT COURT
GALVESTON COUNTY, TEXAS

[DEFENDANT'S RIGHT THUMBPRINT]

Court Stamp: /s/ illegible

APPENDIX D

AMENDMENT VI.

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of person in each State, excluding Indians not taxed. But the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridges, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.